In the

United States Court of Appeals

For the Ninth Circuit

STATE OF WASHINGTON, a Sovereign State, and SMITH TROY, Attorney General of the State of Washington, *Appellants*, v. UNITED STATES OF AMERICA, *Appellee.*	No. 12895.
UNITED STATES OF AMERICA, *Appellant*, v. STATE OF WASHINGTON, A Sovereign State, and SMITH TROY, Attorney General of the State of Washington, *Appellees.*	

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

REPLY BRIEF OF APPELLANTS AND CROSS-APPELLEES

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1. Reply to Defendant's First Argument.

Defendant in its first argument cites and quotes from *Hadley v. Arms & Scott*, 136 Wash. 632, 241 Pac. 26, and

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[1] Since consolidated cross-appeals are involved herein, the several parties are referred to in this brief, for the purposes of convenience and avoidance of confusion, by their respective designations in the court below, that is, the State of Washington, and Smith Troy, Attorney General of the State, are referred to herein as "plaintiffs" and United States of America, defendant, and cross-complainant below, is referred to herein as "defendant."

Benefield v. Eagle Brass Foundry, 154 Wash. 330, 282 Pac. 213. Both of these cases involve the interpretation of city ordinances of Seattle, Washington, and are not in point upon the question of the interpretation of Rem. Rev. Stat., § 6360-5, which is the question before the court upon this appeal.

Defendant quotes from *Puget Sound Electric Ry. Co. v. Benson*, 253 Fed. 710 to support its contention that a fire truck while returning to the fire station after having answered a fire alarm is nevertheless responding to an emergency call. It is contended that "The reasoning of this court in the *Benson* case, *supra*, should be as applicable now as then."

Part of the quotation relied upon by defendant to support this contention is found at page 711 of the *Benson* case, *supra*, as follows:

> "* * * On the other hand, fire and police protection may depend as well upon prompt action in housing the fire apparatus and having patrol wagons convenient for any emergency, so that, whether the fire department or the police department is responding to one call *or making ready to meet the exigencies of another*, it is an act required for rendering prompt and proper fire or police protection, which is the essential purpose of the ordinance." (Emphasis supplied.)

The Washington statute bestowing immunities from the rules of the road upon authorized emergency vehicles under certain conditions (Rem. Rev. Stat., § 6360-5) makes explicit provision as to when these immunities will be extended as follows:

> "The provisions of this act shall be applicable to the operation of any and all vehicles upon the

public highways of this state except that they shall not apply in the following cases:
"(a) To any authorized emergency vehicle properly equipped as required by law and actually responding to an emergency call *or in immediate pursuit of an actual suspected violator of the law*, within the purpose for which such emergency vehicle has been authorized: * * *." (Emphasis supplied.)

It cannot be contended that under the above quoted statute a police vehicle "making ready to meet the exigencies of another" emergency, as was stated in the *Benson* case, *supra*, is entitled to the immunities afforded by this statute. By analagous reasoning a fire engine "making ready to meet the exigencies of another" emergency is not "*actually responding to an emergency call*" (emphasis supplied), and it is submitted that the reasoning of the *Benson* case, *supra*, is not "as applicable now as then."

At page 12 of defendant's brief, it is stated that the plaintiff in its first specification of errors seems to question the authority of the army to send a fire truck into the confines of the city without express authority for so proceeding. The defendant misconceives the plaintiff's first specification of errors as that specification speaks not of an "unauthorized" trip but only of an "emergency" trip.

The case of *Rollow v. Ogden City*, 66 Utah 475, 243 Pac. 791, is cited in defendant's brief at page 13 for the proposition that statutes regulating the speed of vehicles generally are not applicable to fire trucks. This case was cited in the plaintiff's brief as illustrative of the common law rule that any municipal corporation which owns and operates a fire truck is not liable for damage negligently inflicted by such fire truck, for the municipal corpora-

tion enjoys the immunity of the sovereign. It is submitted that this case is not in point on the question of the interpretation of the Washington statute here in quesion.

The case of *White v. City of Casper*, 35 Wyo. 371, 249 Pac. 562, is quoted in defendant's brief at page 14, as follows:

> "We think that the exemption mentioned in the Statute above quoted contemplates that an actually existing fire in the city is an emergency which justifies excessive speed, and that the men operating the fire department may construe it to be such. Whether a fire in a city is or is not of a grave character cannot, in many cases, be determined in the first instance. It may or may not be, depending on many different circumstances. A fire that at a casual glance would appear insignificant might, under favorable conditions, be turned into a conflagration. We cannot believe that the Legislature intended that the character and extent of the fire must, in order to justify excessive speed, be determined beforehand—and that at the peril of the city."

The plaintiff has no argument with the above quoted statement of the Wyoming Supreme Court. At the trial of this cause in the district court the driver of the army fire truck on cross-examination testified as follows:

> "Q. (By Mr. Nelson): Mr. Nelson, at the time you received the message at the fire house to take the fire truck out of this Army fire house, you did not think at that time that you were going to a fire, did you?
>
> "A. I knew I wasn't going to a fire. It was stand-by.
>
> "Q. You knew that you were going to the Vancouver Fire Station to stand by?
>
> "A. Yes." (Tr. 107.)

2. Reply to Defendant's Second Argument.

It is contended by the defendant that Eldon Parke, the driver of the state patrol vehicle, heard the siren of

the fire engine in time to have avoided the collision at the street intersection. On cross-examination Mr. Parke testified as follows:

> "Q. Mr. Parke, how much time interval was there from the time you first heard a siren until you were struck by the truck?
>
> "A. It would have been a matter of a very few seconds; just seconds of time." (Tr. 83.)

The court in its oral findings and decision states:

> "The patrol car was on an arterial and it was in the favored position with reference to traffic approaching from its left. The patrol car driver says he didn't hear and I shall find that he didn't hear, the siren and didn't see the red flashing light on the Army fire truck." (Tr. 126.)

The case of *Ferraro v. Earle et al.*, 105 Vt. 243, 164 Atl. 886, is cited by defendant at page 18 of its brief and it is pointed out by the defendant that in that case the trial court's instruction was to the effect the fire truck must obey a traffic signal the same as others, but the Supreme Court of Vermont reversed the judgment on verdict in favor of the driver of the car in which the plaintiff was a passenger and remanded the cause. A reading of this case discloses that the statute there under consideration gave ambulances, police department and fire department vehicles *carte blanc* right of way over all other vehicles and the case is not in point upon the questions involved on this appeal.

The plaintiff agrees with the quotation from *Coltman v. City of Beverly Hills*, 409 Cal. App. (2d) 270, 105 P. (2d) 153, set out in defendant's brief at page 18. In this case the court states at page 154:

> " * * * The test for determining whether a publicly owned motor vehicle is at a given time an authorized emergency vehicle responding to an

emergency call is not whether an emergency in fact exists at the time but rather whether the vehicle is then being used in responding to an emergency call. Whether the vehicle is being so used depends upon the nature of the call that is received and the situation as then presented to the mind of the driver."

3. Reply to Defendant's Third Argument.

It is contended by defendant that the driver of the state patrol vehicle was contributorily negligent in not avoiding the collision at the intersection. In support of this contention defendant quotes from *Hartnett v. Standard Furniture Co.*, 162 Wash. 655, 299 Pac. 408. The facts in the cited case were quite different from those in the case at bar. In the cited case a furniture truck was in collision at a street intersection with a fire truck which was responding to a fire alarm. In speaking of the driver of the furniture truck, the court stated at page 665:

> "* * * He testified that, when he arrived at the intersection, he looked to the east and to the west on Sixty-Fifth street and did not see the fire truck. It is inconceivable that had he looked he would not have seen that truck. That vehicle was plainly visible for a distance of three blocks to the west a few seconds prior to the time the furniture truck attempted to cross the intersection. * * *."

4. Reply to Defendant's Fourth Argument.

Defendant contends that this cause of action was dismissed on January 17, 1949, pursuant to stipulation of the parties, and that such dismissal operated as an adjudication upon the merits pursuant to Rule 41(b), Federal Rules of Civil Procedure.

This dismissal was voluntary and was pursuant to an order of the court based upon the stipulation of the parties. (Tr. 45.)

The case of *Cornell v. Chase Brass & Copper Co., Inc.*, 45 F. Supp. 979, which is cited by defendant at page 21 of its brief, seems to be decisive upon the question of the effect of a dismissal pursuant to stipulation. Rule 41(a) governs voluntary dismissals and speaking of this rule the court in the cited case stated at page 981:

> "* * * That rule distinguishes between dismissals by notice and dismissals by stipulation. A notice on a stipulation of dismissal which is silent on the question of prejudice is made to operate without prejudice. After one dismissal by plaintiff the rule provides that only a dismissal by notice shall operate as an adjudication. * * *."

It should be pointed out that this cause of action was never, prior to January 17, 1949, dismissed by the plaintiff and it is submitted that the dismissal of this cause on January 17, 1949, pursuant to stipulation of the parties, did not become an adjudication upon the merits by Rule 41(b).

CONCLUSION

The army fire truck raced through the busy streets of the City of Vancouver, Washington, disregarding arterial stop signs and other rules of the road, in order that it might be present at the Vancouver fire station to answer an alarm of fire were one to be made. The fire truck was not actually responding to an emergency alarm within the purposes for which the fire truck was designated, and was not immune from the rules of the road. The state highway patrol car was in the favored position, and the defendant is liable for the damages inflicted by its fire truck.

Respectfully submitted,

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